90-1811

No._____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

RAYMOND and DORINA MATEYKO...Petitioner
v.
THOMAS FELIX, MICHAEL SERAFIN, THE CITY OF LOS ANGELES

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAW OFFICE OF MICHAEL WEISS
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I. QUESTIONS PRESENTED FOR REVIEW:

(i) Was it a plain error of law for the District Court to send a special verdict form back to the jury for correction of discrepancies per Gallick v Baltimore & Ohio RR Co., 83 S Ct 659, 372 US 108. Alternatively, is there a conflict between the lower courts of appeal on whether a District Court has complete discretion to return a special verdict form to the jury for correction of discrepancies.

(ii) Will this Court exercise its supervisory power over lower federal courts and grant a new trial concerning the City of Canton, Ohio v Harris "deliberate indifference" issue because the plaintiff can adduce sufficient probative evidence to meet that standard and because that standard was enunciated

over one year after the District Court ruled on its directed verdict.

(iii) Was it a mixed error of law and fact for the Ninth Circuit for the court not to recognize the effect of objective prejudicial closing argument.

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V. REFERENCE TO OFFICIAL REPORTS: 913 F2d 744 and 924 F2d 824.

VI. SUPREME COURT JURISDICTIONAL GROUNDS: Rule 10(a) and (c) provides that this Court may exercise its discretion to review a case where there is a conflict between federal courts of appeal and when where is a conflict between a federal court of appeal and an applicable Supreme Court decision. In this case petitioner contend both grounds exist. Petitioner seeks to have the Court review the Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit entered on January 23, 1991. The Court has jurisdiction to review this matter pursuant to 28 USC 1254(1).

(a) Date of Judgment: September 6, 1990

(b) Rehearing Date: January 23, 1991.

VII. CONSTITUTIONAL PROVISIONS OR

STATUTES INVOLVED:

4TH AMENDMENT: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

14TH AMENDMENT: "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 USC 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit inequity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively tot he District of Columbia shall be considered

to be a statute of the District of Columbia."

CALIFORNIA PENAL CODE 148 [West 1987]: "Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, is punishable by fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

VIII. STATEMENT OF THE CASE: In Los Angeles on the afternoon of December 18, 1983, defendant officer Thomas Felix

stopped Mateyko for crossing a street without stopping for a red traffic light in violation of California Vehicle Code 21453(d). Mateyko verbally objected to issuance of a citation, and Felix radioed for assistance. Defendant officer Michael Serafin responded to Felix's request for assistance and used a Taser gun to subdue Mateyko. Mateyko was charged and ultimately convicted of a violation of California Penal Code 148.

Mateyko brought this action against the City and officers Felix and Serafin pursuant to 42 USC 1983, alleging Felix and Serafin violated Mateyko's federally protected rights by using unnecessary force. Mateyko asserted pendent state law claims for assault, battery, negligence and emotional distress. At the close of Mateyko's case in chief, the

court granted the City's motion for a directed verdict on Mateyko's action against the City and all Mateyko's claims against Felix and Serafin were submitted to the jury by special verdict. The jury found for defendants on all claims, except on Mateyko's claim against the City for negligent infliction of emotional distress. Mateyko appealed arguing, among other things: (1) the directed verdict for the City was improper (2) the special verdict form was improper and that the trial court erred in resubmitting the verdict to the jury to reconcile an ambiguity and (3) the conduct of defense counsel in questioning witnesses and in closing argument was unfairly prejudicial.

IX. DISTRICT COURT JURISDICTION: 28 USC 1343 and 28 USC 1331, insofar as

plaintiff alleged violation of constitutional privileges and immunities by state actors.

X. REASONS AND ARGUMENT FOR WRIT OF CERTIORARI:

(i) DEFECTIVE TRAINING:

The Ninth Circuits opinion at Part II, paragraph 3 states in part: "We agree with the district court that no reasonable jury could conclude these alleged inadequacies in training without more, established deliberate indifference to the rights of persons with whom the police came in contact." Petitioner contends that he should get a new trial to develop the Ninth Circuits "without more" statement. However the District Court made no such finding; rather at p. 7 lines 13-18 of the March 8, 1988 transcript it states: "I believe the

motion for directed verdict pertaining to the city should be granted, and it is granted. It seems to me that there has not been the requisite showing of any kind of a pattern or of a policy by the city... and it is simply not there." So the city is --that motion is granted." See Appendix part 4 which includes a sampling of Los Angeles Times articles. These articles are probative of a pattern of abuse or lack of training by L.A.P.D. police officers with Taser guns which accordingly should have put the Police Department on notice of problems and lack of training.

In the last paragraph of Part II the Ninth Circuit states "Nothing in the record suggests the City knew it was creating an unjustifiable risk to its citizenry and ignoring that risk as

required by City of Canton. The same must be said of the Citys failure to inform its officers of the exact voltage of a Taser or its precise effect upon the human body." As above-contended petitioner can further develop the record on this issue in a new trial, and will now point some other already-existing probative evidence regarding same.

The transcript of Michael Serafin at p. 29 lines 3-17 indicated that he had only 3 hours of Taser training and only fired the Taser gun 3 times during training and that he had no re-training. Trial counsel for Mateyko may have been trying to develop the **constitutional content** of the training program-but his line of questioning was cut off by the District Court as irrelevant. On a new trial counsel can re-develop this line of

questioning with appropriate instructions from this Court.

Dillenbeck v. City of Los Angeles (72 Cal.Rptr. 321, 69 Cal.2d 472) stands for the proposition that leeway into questioning employees about safety manual provisions should be allowed. Petitioner contends that Dillenbeck is an important case in resolving this Writ request, just as is the following cite.

> "The issue in a case like this one, however, is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." [I]t may happen that in light of the duties assigned to specific officers or

employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. FN10. For example, city policy makers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see

Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights. It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policy makers, who, nevertheless, are "deliberately indifferent" to the need. FN11. The record indicates that city did train its officers and that its training included first-aid instruction. See App. to Pet.

for Cert. 4a. Petitioner argues that it could not have been obvious to the city that such training was insufficient to administer the written policy, which was itself constitutional. This is a question to be resolved on remand.

The final question here is whether this case should be remanded for a new trial, or whether, as petitioner suggests, we should conclude that there are no possible grounds on which respondent can prevail. See Tr. of Oral Arg. 57-58. It is true that the evidence in the record now does not meet the standard of s 1983 liability we **1207 have set

forth above. Whether respondent should have an opportunity to prove her case under the "deliberate indifference" rule we have adopted is a matter for the Court of Appeals to deal with on remand. Justice O'CONNOR, with whom Justice SCALIA and Justice KENNEDY join, concurring in part and dissenting in part. Where, as here, a claim of municipal liability is predicated upon a failure to act, the requisite degree of fault must be *395 shown by proof of a background of events and circumstances which establish that the "policy of inaction" is the functional equivalent of a

decision by the city itself to violate the Constitution. Without some form of notice to the city, and the opportunity to conform to constitutional dictates both what it does and what it chooses not to do, the failure to train theory of liability could completely engulf Monell, imposing liability without regard to fault. Where a s 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their

citizens, the dictates of Monell are satisfied. In my view, it could be shown that the need for training was obvious in one of two ways. First, a municipality could fail to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face. As the majority notes, see ante, at 1205, n. 10, the constitutional limitations established by this Court on the use of deadly force by police officers present one such situation. The constitutional duty of the individual officer is clear,

and it is equally clear that failure to inform city personnel of that duty will create an extremely high risk that constitutional violations will ensue. Second, I think municipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion. See, e.g., Fiacco v. City of Rensselaer, 783 F.2d 319, 327 (CA2 1986) (multiple incidents required for finding of deliberate indifference); Patzner v. Burkett, 779 F.2d 1363, 1367 (CA8 1985) ("[A]

municipality may be liable if it had notice of prior misbehavior by its officers and failed to take remedial steps amounting to deliberate indifference to the offensive acts"); Languirand v. Hayden, 717 F.2d 220, 227-228 (CA5 1983) (municipal liability for failure to train requires "evidence at least of a pattern of similar *398 incidents in which citizens were injured or endangered"); Wellington v. Daniels, 717 F.2d 932, 936 (CA4 1983) ("[A] failure to supervise gives rise to s 1983 liability, however, only in those situations where there is a history of wide-spread abuse.

> Only then may knowledge be imputed to the supervisory personnel"). The Court's opinion recognizes this requirement, see ante, at 11, and n. 10, but declines to evaluate the evidence presented in this case in light of the new legal standard." City of Canton, Ohio v Harris (109 S Ct 1197, 489 US 378, 103 L Ed2d 412)

In this case some relevant Los Angeles Police Department (hereinafter L.A.P.D.) policies may be found in its Manual at sections 1/240.05, 1/240.10, 4/216.22 and 4/707, copies of which at in part 4 of the Appendix herein. The Manual sanctions arrests for "interference" under Penal Code 148.

Penal Code 148 does not include interference; rather just obstructing, resisting and delaying. The California Legislature did specifically proscribe interfering in Welfare and Institutions Code 9732 (regarding W & I 9720 investigations), Labor Code 18854, Education Code 10902.5, Elections Code 29612, 29645, Code of Civil Procedure 872.130(c) and Penal Code sections 148.2, 169, 369i, 370, 402(b), 593, 593c, 626.8, 2772, and 2790.

The L.A.P.D. Manual directs police officers not to second guess the constitutionality of a statute such as Penal Code 148. Petitioner contends Penal Code 148 is substantially overbroad because no California Supreme Court has delimited its scope by excising from its sweep statements of free speech. Malley

v Briggs (106 S Ct 1092, 471 US 1124, 86 L Ed2d 271 held that no immunity exists for police officers who execute objectively defective warrants, and the same may be said of objectively defective statutes.

Under Sibron v New York, 88 S Ct 1889, 392 US 40, 20 L Ed2d 917, petitioner Mateyko requests permission to address the substantial overbreadth and unconstitutionality of Penal Code 148.

Petitioner contends that the L.A.P.D. use of force policy was unconstitutional as applied because it allowed potentially deadly force (Taser gun electricity) other than when a police officer has probable cause to believe the suspect poses an immediate threat of serious physical harm either to himself or others, per Tennessee v Garner (105 S

Ct 1694, 475 US 1, 85 L Ed2d 1). Petitioner contends that the Police Department was at fault in its training program because there was no instruction given to Officer Serafin or his class on how to safeguard the constitutional rights of suspects to be free from the use of excessive force, nor when to arrest under Penal Code 148 when free speech is involved.

Officer Serafins training record, found in the Appendix at part 4, shows no training on "Individual Constitutional Rights," nor "Constitutional Limitations on use of Deadly force," or the like. And it was physically impossible to cram into his 3 hour Taser class (which apparently just part of a larger "advanced officer school" training on constitutional rights of free speech and

freedom from use of excessive force. People react differently to electricity. It only takes 4 miliamps to kill a person if he is subjected to it long enough. Heart condition, weight, size, age, gender, drugs, etc., all are important variables in determining what is excessive electricity to a body, and a 3 hour class just cannot cover it all adequately.

Petitioner contends that the L.A.P.D.'s deficiency in training, supervising, and disciplining of its police officers actually caused Officer Serafins indifference to Mateykos constitutional rights to free speech and to be free from excessive force.

Officer Serafin could not recall who his teacher was nor anything about his Taser training class. A reasonable trier

of fact could conclude that the only thing he and his class learned was how to fire the weapon and reload it, taking into consideration that said training class also required the firing of the weapon, at some location. Serafins trial transcript at p. 27 line 24-25 states "The Taser gun has no sighting devices on it. You just align the top of the device with the main portion of the body." P. 29 lines 3-17 go on to indicate that Officer Serafin only had 3 hours of training and only fired it 3 times, and that he had no re-training. P. 30 line 9-17 indicates that the Taser gun - "its very inaccurate." Where did you aim it? "at the chest area" [however Mateyko was in fact hit in the testicles] ...while Mateyko was "in a sitting position." Shooting at the chest may infer defective

training because the heart is in that area; and, shooting a suspect sitting on the ground while 3 officers are on the scene may also indicate defective training as to when it is the appropriate time to use such a weapon, as contrasted with other control techniques. Page 34 line 4-5 state "It was my impression then that he stopped resisting. That's why I discontinued the charge." It is a fact that suspects on PCP have taken 24 bullets after a car accident and are still combative. To shoot electricity until the suspect stops resisting may well lead a juror to find defective training and excessive force. Because the Taser gun is "very inaccurate" a reasonable juror may conclude that its just like a lie detector test or an experimental drug. Both are too

inaccurate to be relied upon in the first place. Page 36 line 3-9 asked "How much voltage continues after shooting" and the response by Serafin was "Some amount of voltage will, I'm not sure how much." This again could lead the juror to believe that neither Serafin nor the class he sat with was properly trained. If Serafin, who presumably is an intelligent police officer cannot answer basic questions like this, the jury could infer that there are a lot of other police officers like him out there on the streets with defective training. The LA Times articles prove this to be true even today. At p. 64 line 14 Serafin states "I never got close enough to him for him to have been a physical threat to me." This statement indicates that Serafin may have been defectively trained as to when

to deploy the weapon, for it infers that as soon as a suspect interferes the Taser gun may be used to shoot 50,000 volts of electricity through him until he stops interfering, and there is no need to try less harmful or painful control tactics. At pages 25 line 16-25 and page 26 lines 1-11 Officer Serafin states that **L.A.P.D. policy** requires that he not physically interject himself in between a suspect and another police officer who are "tied up" in a combative situation.

L.A.P.D. Order No. 3 (see Appendix part 4 herein) dated February 3, 1983 states at p. 2 paragraph 3 "Tasers shall be issued to and be used only by offices who have completed the Departments TASER training program." Serafins In-Service Training Record does not specifically indicate such training was completed,

which may have lead a reasonable juror to believe that the L.A.P.D. was lax in supervision. At page 3 of said document in paragraph 3 it is stated under Field Supervisor-Responsibilities - item 4 - that they are to "ensure that all arrest reports, associated with the use of a TASER, are marked "Altercation-TASER" on the left-hand margin of the face sheet." The arrest report (see Appendix part 4 herein) did not bear any such notation, which again could lead a reasonable juror to infer that there may be deficient supervision.

If Mateyko was granted a new trial he would point out specifically just where Officer Serafins class training program was defective; and, he could point out to the jury the numerous and well known occasions when L.A.P.D.

officers used or abused Taser guns such as to put the Police Department on notice of abuse or defective training in this area. Most everybody in Los Angeles reads the Los Angeles Times including L.A.P.D. Chief Daryl Gates and his training and discipline staff. For any "pattern and practice" case the plaintiff needs a lost of statistics. Petitioner contend they already exist and can be readily gathered up in order to meet with the City of Canton, Ohio holding.

(ii) CONFLICT BETWEEN LOWER COURTS RE: SPECIAL VERDICT FORM INCONSISTENCIES

The Ninth Circuits opinion at Part III paragraph 5 states "We decline to follow the latter aspect of McCullum. If the inconsistency between special verdict answers is noticed prior to the dismissal of the jury, the district court has

discretion to resubmit the issue to the jury with a request for clarification." This paragraph also cites cases to support its opinion, and all in all indicates a conflict between appellate circuits on the issue. Petitioner contends this is a serious error, and is not consistent with the opinions of this Court and in particular Gallick v Baltimore & Ohio RR Co (83 S Ct 659, 372 US 108).

It is the trial judge himself who must resolve the discrepancies if possible, as petitioners Opening Brief to the Ninth Circuit pointed out.

(iii) PREJUDICIAL CLOSING ARGUMENT AT TRIAL

The Ninth Circuits opinion at Part IV paragraph 4 states "The trial court is in a far better position than we to gauge

the prejudicial effect of improper comments." Petitioner contends that the nature of the statements were per se objectively prejudicial. The following case indicates that mud-slinging is no new tactic for the L.A.P.D.

> "All of the objections were directed to the impropriety of the impeachment and all were overruled. 'By Mr. Daly: Q. Mr. Graves, have you ever been convicted of a felony? 'A. Convicted? No. 'Q. Did you ever plead guilty to a felony? 'A. No.' Counsel for plaintiff, Mr. Belli, objected. 'The Court: It's a proper question. Have you ever been convicted of a felony? You may answer that yes or no.

'The Witness: I've violated a probation, if that is a conviction; but behind the probation I was found not guilty, but I was put on probation, and a fine, which I did violate.' Further inquiry along these lines was postponed until the following morning, when the trial judge made this ruling: 'The Court: All of the testimony of this witness in reference to being convicted of a felony or being on probation is stricken from the record, and the jurors are to disregard it and treat it as though they had never heard of it. * * * 'Mr. Belli: Excuse me. Just a minute. Will your Honor,

respectfully, instruct the jury that the witness has not been convicted of a felony? 'The Court: The defendant (Sic, witness) has not been convicted of a felony. 'Mr. Belli: Thank you. 'The Court: He has been arrested. All other testimony in reference to this witness regarding arrest or felony is stricken from the record, other than the fact that he suffered an arrest.' After plaintiff's counsel objected to the judge's references to arrest and his motion for mistrial was denied, defense counsel proceeded to further cross- examine Graves. On recross-examination, the following colloquy ensued:

'Mr. Daly: Let the record indicate that this is for the purpose not of impeachment but for the purpose of bias, motive and prejudice.' Mr. Belli's objection was overruled. 'By Mr. Daly: Q. Mr. Graves, on April 4, 1959, were you arrested for statutory rape by the City of Los Angeles police officers?' Mr. Belli's objection was overruled. 'Q. By Mr. Daly: Were you arrested on April 4, 1959, for statutory rape by the City of Los Angeles Police Department? 'A. Yes, I was. 'Q. And were you arrested on 11--13--59 for traffic warrants by the Los Angeles Police Department?'

Mr. Belli's objection was overruled. 'Q. By Mr. Daly: Were you arrested in 1961 for narcotics? 'A. Not that I recall.' Mr. Belli's objection was overruled and his motion for mistrial was denied. 'Q. By Mr. Daly: Were you arrested on June 27, 1961, by the Los Angeles Police Department for more traffic warrants? 'A. Perhaps.' Mr. Belli's objection was overruled. 'Q. By Mr. Daly: October 14, 1963, were you arrested for more traffic warrants?' Mr. Belli's objection was overruled and his motion for mistrial was denied. 'The Witness: It's possible.' Mr. Belli's motion

for mistrial was denied. 'Q. By Mr. Daly: July 24, 1964, were you arrested for failing to appear on traffic warrants?' Mr. Belli's objection was overruled. 'Q. By Mr. Daly: June 13, 1965, were you arrested for violation of 459 of the Penal Code, burglary? 'A. No.' Mr. Belli's objection was overruled. 'Q. By Mr. Daly: On March 10, 1966, were you arrested for 459 P.C., charged with 484 Penal Code, petty theft?' Mr. Belli's objection was overruled. 'The Witness: Yes.' The rulings of the trial judge in the instant action permitted wholesale circumvention of the

language and policy of the foregoing sections of the Evidence Code.All of this was undertaken under the guise of suggesting bias of the witnesses against the police in general and Officers Kilgo and Rinehart in particular, but the effect was clearly to accomplish that which the Evidence Code precludes. The members of the jury were permitted--indeed encouraged--to disbelieve the testimony of Graves and Plankers because they were men of generally 'bad character' who had been 'in trouble' with the police." Grudt v. City of Los Angeles (86 Cal.Rptr. 465,

2 Cal.3d 575)

This Court has spoken similarly in Huddleston v United States 108 S Ct 1496, 485 US 681, 99 L Ed2d 771 and Green v Bock Laundry Mach Co., 109 S Ct 1981, 104 L Ed2d 559. Petitioner contends that an objective standard for reviewing prejudicial closing remarks as stated in Harrington v California 89 S Ct 1726, 395 US 250, should be utilized to find that such existed in the present case.

For the foregoing reasons, it is submitted that a Writ of Certiorari should issue to review the January 23, 1991 decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted

RAYMOND MATEYKO, Petitioner

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CERTIFICATE OF SERVICE

I, Michael Weiss, attorney for petitioner, state that I have this 22nd day of April, 1991, deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing Petition for Writ of Certiorari, to the Honorable Richard Helgeson, attorney for the respondents, at his mailing address of 200 North Main St #1700, Los Angeles, California 90012, 213-485-0735. All parties required to be served have been served.

Michael Weiss

Michael Weiss, Attorney for Petitioner